No. 14,953

IN THE

United States Court of Appeals

For the Ninth Circuit

JOHN O. ENGLAND, Trustee of the Estate of Daniel E. Sanderson, Bankrupt,
Appellant,

vs.

DANIEL E. SANDERSON, Bankrupt,
Appellee and Petitioner.

APPELLEE'S PETITION FOR A REHEARING.

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APPELLEE'S PETITION FOR A REHEARING.

To the Honorable Judges of the United States Circuit Court of Appeals for the Ninth District, the Honorables Orr, McAllister and Barnes:

Appellee, Daniel E. Sanderson, the bankrupt herein, respectfully petitions this Honorable Court for a rehearing of the above entitled matter and for its order setting aside the opinion and judgment herein made, given and filed on September 10, 1956, assigning therefor the reasons hereinafter set forth.

PRELIMINARY STATEMENT.

For the purposes of this petition, appellee accepts that portion of the decision and opinion on file which

holds that all matters pertaining to exemption claims must be retained in, determined and enforced by and only within the jurisdiction of the Bankruptcy Court.

POINT I.

As first ground of specification, appellee respectfully urges that this Court is in error in holding that notwithstanding that the clear statutory homestead exemption existing by California statute (C.C. 1260) at the time of filing of the petition in bankruptcy herein was fixed in the sum of $12,500, nevertheless the bankruptcy court must be guided by "the construction placed upon Section 1260 by the California courts" (see page 2 of the printed opinion). By so deciding, this Court erred in not giving force to the clear meaning of the words "prescribed by" and "state laws in force at the time of the filing of the petition" as the same are used and set forth in Section 6 of the Bankruptcy Act.

The words "prescribed by" have been given force and clear meaning in many decisions, and, almost without dissent, they hold that these words *mean statutory law, and statutory law only.* The latest expression of the California courts is found in (1955) *Gilliam v. California Emp. Stabil. Comm.*, 130 Cal. App. 2d 102, 114 (hearing denied by California Supreme Court), where the court states:

> "It is a general law of statutory construction that where an act of the Legislature refers to 'laws', the expression will be held to refer to stat-

ute law, rather than to the common law, unless the context requires a different construction. In Southern Bell Tel. & Tel. Co. v. Beach (1911) 8 Ga. App. 720 (70 S.E. 137), the Georgia statute provided for attorney's fees in actions for damages for injury due to the failure of a common carrier to perform any act required by 'any law' of the state. Referring to the act which the telephone company had failed to perform, the court said: 'In a broad sense, it was a violation of the law of the state of Georgia, for the common law is a part of the law of the state of Georgia' * * * The court then referred to the rule of statutory construction above mentioned and pointed out that in Brinckerhoff v. Bostwick, 99 N.Y. 654 (1 N.E. 663), it is held that expressions in statutes, such as "required by law", "prescribed by law", "regulated by law", etc., refer to statutory provisions only; and the expression "liability created by law" as used in the Code of Civil Procedure was held to refer only to statutory liability, and not to liabilities recognized by the general law. Constitutional provisions that the attorney general shall perform such duties as may be prescribed by "law" mean statute law (State ex rel. McKittrick v. Missouri Public Service Commission, 152 Mo. 29 (175 S.W. 2d 857); Shute v. Frohmiller, 53 Ariz. 483 (90 P. 2d 998))."

Many other cases are in accord with the principle of statutory construction which is stated in the foregoing *Gilliam* case, viz.:

Arizona:

Shute v. Frohmiller, 90 P. 2d 998, 1001.

California:

Exline v. Smith, 5 Cal. 112, 113;

Duran v. Pickwick Stages System, 140 Cal. App. 103.

Idaho:

Howard v. Cook, 83 P. 2d 208, 210.

Missouri:

McKittrick v. Mo. Public Service Comm., 175 S.W. 2d 857.

New Mexico:

Ex parte De Core, 136 P. 47, 52;

New York:

Brinckerhoff v. Bostwick, above cited, 1 N.E. 663;

People v. Santa Clara Lumber Co., 106 N.Y.S. 624, 626;

Bd. Education v. Town Greenburgh, 13 N.E. 2d 768, 770.

Utah:

Winters v. Hughes, 24 P. 759, 761.

West Virginia:

Lawson v. Kanawha County Court, 92 S.E. 786, 789.

Furthermore, judicial decision is not "law". It is merely evidence of what the law is, and a change of decision is not the promulgation of a new law. (Iowa) *Swanson v. City Ottumwa,* 106 N.W. 9, 13. This is merely repetitive of the statement long ago

made by Justice Story in the case of *Swift v. Tyson* 41 U.S. (16 Pet.) 1, 10 LE 865, and which has found concurrence in later cases, including *U. S. Savings & Loan Co. v. Harris,* 113 F. 27, 35. The reason that judicial decision is not considered "law" is that decisions are—

> "often re-examined, reversed, and qualified by the courts themselves, whenever they are found to be either defective, ill-founded, or otherwise incorrect" (*U. S. Savings & Loan Co. v. Harris,* supra, at p. 35).

There should be no uncertainty about the meaning of the "law" of exemption. It should be fixed and made certain and unequivocal. The decision of this Court does not make for such certainty. It is respectfully urged that this Court should give a clear-cut decision as to the meaning of the statutory expressions used by Congress in Section 6 of the Bankruptcy Act, which the opinion and decision herein rendered fail to do.

POINT II.

As a second ground of specification of error, petitioner respectfully urges that the effect of the announced decision is to hold that Congress cannot, in matters of bankruptcy, control the rights of exemption of bankrupts, but that it has left this up to the decisions of state courts on the subject. To do so (i.e., give or withhold the specified right of exemp-

tion), we repeat, overlooks and cancels out the clear meaning and intent of Congress in announcing its mandate in Section 6 of the Bankruptcy Act to the effect that exemptions to bankrupt are to be allowed as "prescribed by" "State laws in force" at the time of the filing of the bankruptcy petition. The decision of this Court means that exemption rights are never fixed with certainty, but are at all times subject to invasion, expansion or diminishment at the whim and fancy of state court decision, and fluctuating judicial policy, and is particularly wrong where the state court decisions which are used as guiding posts for the determination in bankruptcy proceedings themselves had nothing to do whatsoever with bankruptcy matters. Such a case was the *Rauer* case (82 Cal. App. 2d 248), relied upon by this Court, which is now used by this Court as a yardstick to determine the measure of exemption rights under the federal bankruptcy statute. *Rauer* merely held that the proscription of the Constitution against invasion of contractual rights by STATES had to be recognized by the California courts and that therefore an increase of an exemption as to a creditor then in existence would invade his rights of contract. That has nothing to do with bankruptcy. The effect of bankruptcy was not alluded to or considered. Yet this Court now holds that the *Rauer* case in effect constricts and limits the action (i.e., legislative action) of Congress. Respectfully, appellee fails to see how such a conclusion logically or reasonably follows. The decision of this Court does not give effect whatever to state "law" but to something entirely different, namely, state "de-

cision". This certainly could not have been, and is not, the intent of Congress.

POINT III.

The third point that petitioner urges upon this Court is that the decision in effect holds that the constitutional proscription against invasion of contracts (by state action) applies equally to congressional action (i.e., the Bankruptcy Act). This is NOT the law. The Bankruptcy Act by its very nature is an Act which invades the obligation of contracts the moment it is invoked by persons entitled thereto. No matter how valid a prior debt, no matter the size of that debt, no matter how founded (except as to certain specified exceptions), a bankrupt is nevertheless entitled to his discharge of that debt when he goes through bankruptcy and receives his discharge. Can the creditor complain? Certainly not, but this is clearly an invasion of his ordinary contractual rights. The reason that he cannot complain is simple: The constitutional proscription does not apply to federal action (see *Re Chicago etc. Ry. Co.,* CCA 7th, 72 F. 2d 443, 452). Congress can do what it pleases in the field of bankruptcy because the Constitution singles out that phase of action for congressional determination and by Congress alone (U. S. Const., Art. I, Sec. 8). It is a prime principle of law that a person contracts with reference to laws in effect at the time of the making of any contracts. The Bankruptcy Act is such a law. It is the law of the

whole land, uniform throughout. The creditor therefore knows, or is bound to know, that his rights are subject to cutoff or cancellation by bankruptcy. It matters not that he is a "prior" or "subsequent" creditor. There is no such distinction. No matter when he contracts with one who subsequently becomes bankrupt, he contracts with the specific probability that his rights can thereafter be affected by the bankruptcy. It certainly is no invasion of his rights to hold, as Congress intended and so clearly specified, that the laws "in force" at the time of the bankruptcy should govern. To consider here the doctrine of impairment of obligation of contracts is to inject into, and consider a false quantity in, our case.

The decision announced by this Court, therefore, clearly runs contrary to and overlooks the principle that the prohibition against impairment of contracts does not apply to Congress or the Bankruptcy Act.

POINT IV.

The fourth point which is urged upon this Court by petitioner is that the decision of this Court is not in keeping with, and runs contrary to, the spirit and intent of the Bankruptcy Act. Instead of giving full relief to debtors, the decision actually takes away and denies them the relief which Congress intended that they should have. In our case particularly, it takes away $5,000 of a bankrupt's equity in property (given to him by state law) at one stroke by concluding that the state courts, and not Congress, should determine

what an exemption should be. That certainly was never the intent of Congress. If it had desired to use an expression in the Act which would have modified its express direction and mandate as to the allowances of exemptions, then instead of using the words "prescribed by" and "in force" in Section 6 of the Bankruptcy Act, it could easily have stated that exemptions should be allowed to the extent, and only to the extent, that they are allowable as to any creditor under and by state law "or decision". But since Congress did not so modify or limit the otherwise clear meaning of its words, then in keeping with the spirit and intent of the Bankruptcy Act, the exemption that should be allowed to the bankrupt as specified by the clear, plain and certain meaning of Section 6, should refer to statutory law and none else. In this case it means the allowance of a $12,500 homestead exemption under Section 1260 of the California Civil Code, nothing less and nothing more. The decision of this Court fails to recognize the spirit and intent of the Bankruptcy Act and the clear meaning of Section 6.

POINT V.

The fifth, and final, point that petitioner urges is that under Section 6 of the Bankruptcy Act, there was no $7,500 exemption "law" in existence at the time of the filing of the petition in bankruptcy, and hence not "in effect". All that was in effect was the latest law on the subject. This Court, by its decision, however, gives effect to a dead law which

was superseded the moment that the amendment to the homestead section became effective. The superseding (and presently effective) law was the enactment of a $12,500 homestead limitation. The effect of the amendment was to—

> "* * * substitute for the original statute or section, continuing in force that which is reenacted and repealing what is omitted."
>
> *Pierce v. County Solano,* 62 Cal. App. 265, 269;
> *People v. Western Fruit Growers,* 22 Cal. 2d 494 at 501.

Hence, for this Court to give effect to an exemption amount which is no longer in existence is to give effect to a law which is not "in effect" "at the time of the filing" of the bankruptcy petition. It gives effect to a "law" long since superseded. Congress specified no saving clauses in Section 6 and its plain meaning should not be disturbed or distorted.

SUMMARY.

To summarize: Legislation which deals with bankruptcy is not subject to the same constitutional limitations as legislation which deals with other subjects, since bankruptcy contemplates a discharge of the debtor's debts, and this is itself an impairment of contractual obligations. Bankruptcy power, which overrides all state law, is granted to Congress by the federal Constitution. In proceedings brought under the Bankruptcy Act, that Act alone is decisive of all questions arising in such proceedings. The fact

that a different rule as to homestead exemption rights could and does apply in bankruptcy proceedings than is applied in proceedings which do not involve bankruptcy is a false and immaterial consideration, since it is the Bankruptcy Act itself which puts those bankrupts who avail themselves of its broad protective powers in a privileged class. For many years Section 6 of the Bankruptcy Act has provided for exemptions prescribed by state laws in force at time of the filing of the bankruptcy petition. The Act refers only to state laws "in force" at that time, and the only "laws" "in force" are statutory laws on the books at the time of the filing of the petition in bankruptcy (see *Re Klumpe,* Cal. 1948 CCH Bankruptcy).

It is respectfully submitted that the importance of the determination herein, which affects bankruptcies throughout the breadth of these United States, should require a rehearing and a further consideration of the matter, and also for the purpose of complete clarity and freedom from uncertainty.

Dated, San Francisco, California,
September 24, 1956.

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LEONARD S. LURIE,
Of Counsel.

Certificate of Counsel

We hereby certify that the foregoing petition for a rehearing is, in our opinion, well founded in fact and in law and is not interposed for delay.

Dated, San Francisco, California,
September 24, 1956.

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